



**[4910-13]**

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**[Docket No. FAA-2011-0361]**

**Policy and Procedures Concerning the Use of Airport Revenue: Petition of the  
Clark County Department of Aviation to Use a Weight-Based Air Service Incentive  
Program**

**AGENCY:** Federal Aviation Administration (FAA), Department of Transportation  
(DOT)

**ACTION:** Partial granting of petition; Disposition of comments

**SUMMARY:** On April 14, 2011, the FAA issued a Notice in the Federal Register (76 Fed. Reg. 21,420, April 15, 2011) seeking comment on a petition submitted by Clark County Department of Aviation (CCDOA), owner and operator of Las Vegas McCarran International Airport (Airport). The petition requested a determination by the Federal Aviation Administration (“FAA”) that its proposed air service incentives program (“Incentives Program”), intended to induce increases in landed weight by air carriers at McCarran International Airport (the “Airport” or “LAS”) in Las Vegas, is consistent with Federal law and policies on the use of airport revenue and on airport rates and charges. In its petition, CCDOA proposed the FAA amend its interpretation of “new air service” to include “increases in landed weight.”

The FAA has interpreted these policies, and the underlying Federal statutes, to permit a temporary waiver of standard airport fees for carriers that provide new air service at an airport, as an incentive to begin or expand air service. In September 2010, the agency issued the Air Carrier Incentive Program Guidebook to provide specific guidance to airport operators on the use of air service incentive programs. That guidance restates FAA's previously issued opinions regarding what constitutes new service as characterized in the FAA's Policy and Procedures Concerning the Use of Airport Revenue (Revenue Use Policy) (64 Fed. Reg. 7,696 (Feb. 16, 1999)). Since the inception of the Revenue Use Policy in 1999, the FAA has defined new air service as: (a) service to an airport destination not currently served, (b) nonstop service where no nonstop service is currently offered, (c) new entrant carrier, and/or (d) increased frequency of flights to a specific destination. The FAA's interpretation has not permitted an airport operator to offer an incentive program that provides discounts based on increased aircraft weight or an increased number of seats on existing flights. CCDOA proposes an incentive program that would reward air carriers for an increase in landed weight. An increase in landed weight could result from an increase in the size of aircraft used, or "upgauging," on existing flights, consolidation of existing flights, and/or added flights. CCDOA requests that the FAA amend existing guidance to make clear that its proposed incentive plan is consistent with Federal law and existing agency policies on the use of airport revenue and on airport rates and charges.

This notice responds to the comments received and grants a portion of the petition as written.

ADDRESSES: Comments received on the petition [identified by Docket Number FAA-2011-0361] are available for public review in the Docket Operations, Room W12-140 on the ground floor of the West Building, 1200 New Jersey Avenue, SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. Also, you may review public dockets on the Internet at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Kevin Willis, Manager, Airport Compliance Division, ACO-100, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267-3085; facsimile: (202) 267-5257.

## **SUPPLEMENTARY INFORMATION**

### **I. The Petition**

On February 14, 2011, the Federal Aviation Administration (FAA) received a letter and a 13-page memorandum from counsel for CCDOA, the owner and operator of McCarran International Airport in Las Vegas, Nevada, requesting a determination from the FAA that CCDOAs proposed air service incentive program does not conflict with Federal obligations

In brief, CCDOA stated that the “objective of the proposed Incentives Program is to provide an incentive at the margin to promote additions to scheduled air service seat capacity.” The program provides, subject to certain terms and exceptions, that:

*... all monthly scheduled service landed weight, by airline, in excess of that operated in the same month of the prior year, would receive a credit of up to 100% of the landing fee (currently \$2.26 per 1,000 pounds of landed weight) paid on the incremental landed weight.*

In addition to new flights, the credit would apply to existing flights for which an increase in aircraft size resulted in an increase in landed weight

In its petition, CCDOA makes the argument that upgauging should be an eligible incentive because it is considered new service. CCDOA reasons in its petition, “*Air travelers, as well as airports, reasonably regard an upgrade in the size of equipment used on a flight to constitute “new service(s).”*” CCDOA stated the Revenue Use Policy does not provide for nor does it exclude upgauging as a form of new air service. Finally, the CCDOA argued the proposed petition is not contradictory to statute, grant assurance obligations, and the FAA’s Revenue Use Policy.

The FAA published the Petition and sought comments on it prior to issuing a determination.

## **II. Discussion**

### *A. Summary of Comments*

In addition to the CCDOA's comments, seven comments were received in the docket. Five comments generally supported the petition; two opposed it. The four airport operator commenters generally supported the petition or greater flexibility for operators to design air service incentive programs. Of the two airline commenters, ATA opposed the petition, while British Airways supported it. One citizen opposed the petition because it would not result in savings for passengers.

#### *Comments in support of the petition:*

In its petition, the CCDOA states it is:

*concerned with a temporary, but precipitous, drop in air service at (LAS) that has not rebounded as quickly as at other airports. Landed weight at LAS was down approximately 17% from Calendar Year 2007 through the 12-month period ending in September 2010. While some individual carriers have expanded operations, these initiatives have fallen well short of restoring McCarran operations to previous levels. This drop-off in operations has meant that the Airport's airside and terminal facilities are not optimally utilized. The shortfall in traffic has also caused a significant drop in Airport revenue, particularly non-aeronautical revenue. While load factors at LAS are high, the service cutbacks by*

*the carriers are reflected in a drop in passengers. On average, the Airport generates approximately \$9 per passenger in non-aeronautical revenue (rental cars, concessions, taxi fees, gaming, etc.). Because of the decline in passenger volume, annual revenue from these sources declined by approximately \$20 million or 10% over a two year period from FY 2008 to FY 2010.*

Additionally, the CCDOA stated the proposed program is needed to:

*to help induce expansion in air carrier operations, and thus promote effective utilization of airside and terminal facilities and generate additional passengers that, in turn, increase non-airline revenues that can be applied to further reduce air carrier costs(.) (T)he Department has developed the Incentive Program to provide temporary relief from fees for increased air service to LAS. The Department views the downturn in operations as a short-term anomaly, and the proposed incentives will be discontinued when traffic is back on track.*

In addition to the Petitioner, two other airport operators generally supported the petition or greater flexibility to allow operators to design air service incentive programs. The Wayne County Airport Authority (WCAA) supported the petition in full. The WCAA agreed with Petitioner that the proposal meets the requirements of federal law and grant agreements, is not barred by law or other FAA policies, is not preempted by the Airline Deregulation Act (ADA), and is not discriminatory unless one carrier obtains the

incentive and another is denied the incentive. WCAA also supported Petitioner's assertion that the FAA should interpret "new service" to include upgauge flights.

The City of St. Louis, owner and operator of Lambert-St. Louis International Airport (STL) generally supported the CCDOA's Petition to use weight-based incentive programs. STL cites its own air carrier use agreement, which allows for mitigation of landing fees with increased levels of total landed weight at the airport. It is important to note that the STL rate structure differs from the Petition because it is not an exception nor an incentive but the basic fee structure agreed to by all carriers. Also, the trigger for STL's program is total landed weight at the airport, not an individual carrier's landed weight. However, STL asserts the justification is the same as that in the Petition and supports a weight-based incentive permitted by federal law.

The Airport Council International, North America (ACI-NA), supported the petition and urged FAA to increase "flexibility in air service incentive programs." ACI-NA did not believe the proposal was discriminatory and did not believe it conflicted with Federal law.

Although the American Association of Airport Executives (AAAE) did not specifically state it supported the petition, it did comment that airports should have maximum flexibility to structure incentive plans to attract and retain air service. The FAA views its comments as generally in favor of allowing changes to the FAA's definitions of the type of service that qualify.

Finally, the foreign air carrier, British Airways expressed support for the petition stating that such incentives will encourage carriers to consider increased capacity and/or frequency.

#### *Comments Not Supporting the Petition*

The Air Transport Association urged the FAA to deny the petition stating the petition lacked a policy rationale, since the incentive plan is designed only to increase concession revenue from passengers, not to obtain new air service. ATA's also argued that service with more seats is not currently defined as "new service," and should not be so defined, because it is not in itself new entry into new markets. ATA discounts the CCDOA's references to FAA's prior determinations in *Wichita* and *Port of Portland*, and claims these documents do not address the question whether incremental increase in landed weight may be considered new service. ATA also states an incremental increase incentive would be discriminatory, because some carriers will not be able to upgauge.

Both proponents and opponents weighed in on the proposal's compliance with the Airline Deregulation Act of 1978. (Public Law 95-504)

A member of the general public objected to the petition stating the benefits provided to carriers will not be passed on to passengers.

#### *B. Summary of Relevant Law, Grant Assurance Obligations and Applicable Policy*



Airport sponsors that accept federal funds under the FAA's Airport Improvement Program [49 U.S.C. § 47101, et seq., and 49 U.S.C. § 40103(e)], agree to a set of standard grant assurances. These include an assurance that airport revenue will be used for the capital and operating costs of the airport or airport system, or certain other purposes. They also include assurances that fees charged air carriers will be reasonable, not unjustly discriminatory, and substantially comparable to fees charged other carriers making similar use of the airport. Additionally, they prohibit exclusive rights and encourage airports to create a fee and rental structure to be as self-sustaining as possible. In reviewing this petition, the FAA determined applicable assurances may include:

Grant Assurance 22, *Economic Nondiscrimination*, implements the provisions of 49 U.S.C. § 47107(a)(1) through (6). The intent of the assurance and statute is to address both the reasonableness of airport access and the prohibition of adopting unjustly discriminatory conditions as a potential for limiting access as well as air carrier agreements.

Grant Assurance 23, *Exclusive Rights*, implements the provisions of 49 U.S.C. §§ 40103(e) and 47107(a) (4) and prohibits airport sponsors from granting exclusive rights to airport users.

Grant Assurance 24, *Fee and Rental Structure*, implements Title 49 U.S.C. § 47107(a)(13) by addressing self-sustainability. The intent of the assurance and

statute is for the airport operator to charge fees that are sufficient to cover as much of the airport's costs as is feasible while maintaining a fee and rental structure consistent with the sponsor's other federal obligations.

Grant Assurance 25, Airport Revenue Use, implements Title 49 U.S.C. § 47107(b)(1) which requires that grant agreements for airport development grants include an assurance that “the revenues generated by a public airport will be expended for the capital or operating costs of—(A) The airport; (B) the local airport system; or (C) other local facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property.”

In addition to the grant assurance obligations, FAA reviewed the petition's compliance with FAA's Policy Regarding Airport Rates and Charges and the Revenue Use Policy.

#### 1. Policy Regarding Airport Rates and Charges (Rates and Charges Policy)

The Department of Transportation published the Rates and Charges Policy on June 21, 1996 (61 FR 31,994), which was amended on July 14, 2008 (73 FR 40,430). The 2008 amendments were intended to provide greater flexibility to operators of congested airports to use landing fees to provide incentives to air carriers to use the airport at less congested times or to use alternate airports to meet regional air service needs. The

policy as amended does not specifically refer to incentive programs or fee waivers, but provides in part:

3. Aeronautical fees may not unjustly discriminate against aeronautical users or user groups.

## 2. Policy and Procedures Concerning the Use of Airport Revenue (Revenue Use Policy)

In the FAA Authorization Act of 1994, Congress expressly prohibited “the use of airport revenues for general economic development, marketing and promotional activities unrelated to airports or airport systems.” [49 U.S.C. § 47107(1)(2)(b)]. In accordance with Congressional direction, the Department of Transportation and the FAA published FAA’s Policy and Procedures Concerning the Use of Airport Revenue. This policy stood up the air carrier incentive program. Specifically under Section V.A.2, Permitted uses of Airport Revenue, the policy states:

*expenditures for the promotion of an airport, promotion of new air service and competition at the airport, and marketing of airport services are legitimate costs of an airport’s operation.* [64 FR 7703]

Section VI.B.12 of the policy, *Prohibited Uses of Airport Revenue*, specifically prohibits the direct subsidy of air carriers with airport revenues, but notes:

*Prohibited direct subsidies do not include waivers of fees or discounted landing or other fees during a promotional period. Any fee waiver or discount must be offered to all users of the airport, and provided to all users that are willing to provide the same type and level of new services consistent with the promotional offering. [64 FR 7720]*

As stated in the Revenue Use Policy,

*The FAA continues to believe that the costs of operating aircraft, or payments to air carriers to operate certain flights, are not reasonably considered an operating cost of an airport. In addition, payment of subsidy for air service can be viewed as general regional economic development and promotion, rather than airport promotion. [See, 64 FR 7709-7710]*

Finally, in its analysis of the petition, the FAA applied the 1978 Airline Deregulation Act (ADA), specifically the preemption provision, [See, 49 U.S.C. § 41713(b)] which states that State and local governments are prohibited from enacting or enforcing any provision having the force or effect of law related to a “price, route, or service of an air carrier.”

### *C. Discussion/Analysis*

FAA’s Revenue Use Policy specifically permits airport operators to offer certain limited term incentives, using airport revenue, to air carriers that opt to participate in incentive

programs. Each incentive program is developed individually and independently by airport operators; however, the Revenue Use Policy specifically limits the goals of incentive programs to encourage 1) new service and/or 2) competition. Over the past decade, FAA has defined new service to include

- 1) Service to a new airport;
- 2) Nonstop service where no nonstop service currently is offered;
- 3) New entrant carrier; and/or
- 4) Increased frequency of flight(s) to a specific destination.

CCDOA petitioned the FAA to expand the definition of new service to include “increases in landed weight.” CCDOA’s petition stated an increase in landed weight could result from an increase in the size of the aircraft a carrier uses – also known as “upgauging” - on existing routes, consolidation of existing flights, and/or added flights. CCDOA requested the FAA amend its existing guidance to make clear that its proposed incentive plan is consistent with Federal law and existing agency policies.

CCDOA did not request FAA amend the Revenue Use Policy; instead, CCDOA asked the FAA make a finding that would expand the agency’s interpretation of new service. FAA has the legal authority to amend or modify interpretations of Policy. It is under this authority that the FAA considered CCDOA’s petition.

### *1. Legal Issues*

In its request, the CCDOA argues increases in seats through increases in landed weight meets the definition of new air service as prescribed in the Revenue Use Policy. The Revenue Use Policy permits airports to offer incentives to airlines for establishing “new service” to (a) increase travel using the airport or (b) promote competition at the airport. In consideration of CCDOA’s request, the FAA has reviewed the petition based on the goals of the air carrier incentive program as defined in the Revenue Use Policy, as well as in accordance with FAA’s airport sponsor assurances and the Rates and Charges Policy.

Previously, FAA opined that an addition of seats on existing flights was not new service. Moreover, since the publication of the Revenue Use Policy in 1999, FAA has been requested on several occasions to opine on its definition of “new service.” Over the past thirteen years, FAA has defined “new service” to include: (a) service to an airport destination not currently served; (b) nonstop service where no nonstop service is currently offered; (c) new entrant carrier; and/or (d) increased frequency of flights to a specific destination, if incentivized by an airport would clearly set out to achieve the goals of the air carrier incentive program. However based on a thoughtful review, FAA agrees that an increase in seats by adding flights, which results in increases in landed weight, can be regarded as new service.

The petition argues that an airport sponsor should be permitted to offer incentives to air carriers based on increases in landed weight. The FAA separated the petition into two arguments based on comments received and FAA’s position that adding seats through

adding flights is considered new service. First, the FAA analyzed CCDOA's position that an air carrier should be eligible for incentives solely based on increases in landed weight. Second, FAA analyzed whether increases in passenger yields as a result of increases in landed weight, whether through adding more flights or upgauging existing flights, should be eligible for incentives.

In analyzing the first argument, FAA determined, that air carriers could increase landed weight, yet reduce the number of flights and the number of seats, which amounts jointly and individually to a reduction in service. As such, this argument could actually undermine one of the two goals of the incentive program allotted for under the current Policy (new service or competition).

FAA then analyzed the second argument, limiting the scope of review to the premise that upgauging individual flights may provide more passenger seats to a designated market or to an airline's overall operation, thus potentially increasing use of an airport. Under certain conditions, the FAA has determined such a program may meet the goals of new service and/or competition in conformance with an airport sponsor's federal obligations and existing policy. Adding more passenger seats to an air carrier's existing flight schedule through upgauging may provide more opportunity for the flying public, which the FAA agrees may increase travel using the airport. However, if an airline decides to consolidate a schedule to a given market while adding passenger seats through upgauging, the airline would be reducing service offered to the flying public or limiting air travel options. This is contrary to the goals of the program, which is to encourage new

service and increase competition. An existing, and unchallenged definition of new service, is adding new flights to existing routes. Allowing flights to be consolidated on existing routes may result in more seats but fewer travel options for the traveling public. The FAA cannot view actions that actually reduce options to be beneficial to the traveling public. Therefore, the FAA has determined that such a program may conflict with program goals specifically identified in existing Policy as well as the airport sponsor's grant obligations even conducted without any controls.

Thus FAA reviewed the petition in light of comments received and FAA's existing position, to determine if upgauging with certain conditions would be a viable option for expanding the definition of new service, as the CCDOA requested in its petition. As a stand-alone incentive, upgauging could possibly be viewed as unjustly discriminatory or conferring an exclusive right because some airlines may not have the ability to upgauge based on the fleet of aircraft used to operate. It is important to understand it is not the role of FAA to accommodate the manner in which an airline or any aviation-based service provider structures its enterprise. However, when using airport revenue to incentivize new service, it is the FAA's role to ensure sponsors do so in a manner consistent with their federal obligations, including the Revenue Use Policy. After FAA's extensive review, with consideration of the incentive program's goals, as well as an airport's federal obligation to be not unjustly discriminatory and not to confer an exclusive right, the FAA has determined the definition of new service can be expanded to include upgauging with certain conditions that ensure compliance goals.



In permitting use of airport revenue for incentive programs, the Revenue Use Policy specifically ties the use to the goal of increasing travel or promoting competition at the airport. Thus, when FAA analyzed the argument that upgauging may allow sponsors more options to increase travel and therefore, use of the airport, the FAA recognized the logical conclusion that more seats on larger aircraft would be a potential means to that goal. It is critical to note that the FAA recognizes that the existence of more seats on an existing route does not necessarily result in more passengers. However, the agency has determined that more seats on larger aircraft serving existing routes may indeed allow sponsors to create incentive programs with more options, as noted by many commenters to the petition, in pursuit of the program's goals.

Balancing the sponsors' goal of increasing travel in accordance with its federal obligations and the Revenue Use Policy, with the airline's business decisions, the FAA has determined that an incentive program may include incentives for upgauging as an expanded definition of "new service" with certain conditions. The FAA has determined that incentive programs cannot target upgauging as the specific goal of the program; instead, the goal must be expanded or added new service. In the petition before the agency, the measurable goal would be to increase use of the airport by increasing total landed-weight, through upgauging on currently served routes and/or additional flights. Such a program would offer all airlines, regardless of aircraft fleet, the ability to participate and thus meet the airport's obligations under Grant Assurances 22 and 23. Any decreases in service on incentive routes is not eligible for participation in the incentive program.

FAA's granting of the CCDOA Petition in part represents a modification to the agency's interpretation of the definition of "new service," which is not defined in the Revenue Use Policy.

## *2. Implementation*

In granting the CCDOA Petition in part, FAA has determined an incentive program may implement the goal of encouraging new service by offering incentives to air carriers opting to either upgauge existing flights to aircraft offering more seats and/or adding a new flight. When an incentive program allows air carriers the option to upgauge aircraft on existing flights to increase seats and/or adding an additional flight, the FAA has determined such a program may meet the definition of new air service as prescribed in the Revenue Use Policy with certain conditions. Previously, the FAA opined that an addition of seats on an existing flight was not new service. This is a change in interpretation on a definition not defined in the Policy.

An air carrier incentive program that includes the following conditions may achieve the goals of the air carrier incentive program as defined in the Revenue Use Policy, and in accordance with statute cited herein:

- A condition permitting an airport sponsor to use airport revenue as part of a comprehensive incentive program to encourage air carriers to increase seats on

existing flights though upgauging must preclude upgauging from being the only component of the incentive program. In other words, upgauging cannot be the stand alone piece of the incentive program. The program must also include offering similarly formulated incentives for adding new flights.

- A condition permitting an airport sponsor to use airport revenue as part of a comprehensive incentive program includes prohibiting air carriers participating in the incentive program from cancelling existing service on the route(s) for which the airport sponsors is offering incentives. To be eligible for incentives to upgauge, an air carrier must demonstrate an increase in service above and beyond the baseline set by the market(s) targeted by the incentive program.
  
- A condition prohibiting air carriers from receiving incentives for “new” flights to other markets targeted under the incentive program when it reduces service in other markets targeted. The goal is for airport sponsor’s to increase use of the airport, thus incentivizing carriers for swapping service to extend incentives is not congruent with the airport sponsor’s goal.

In its review, FAA agrees air carrier incentive programs should include, as a matter of compliance, a provision to ensure air service is not lost nor substituted. In response to the CCDOA’s petition, the FAA agrees that an airport sponsor may exercise oversight and judgment to ensure its air carrier incentive program is administered in a nondiscriminatory manner. Any allegations of unjustly discriminatory treatment or other

assurance violations remain within the jurisdiction of the FAA. The oversight described by the CCDOA in its petition would allow the airport operator the ability to set parameters for carriers for certain landed weight of different aircraft type. The FAA believes the manner in which CCDOA plans to implement its oversight on landed weight will achieve the goal of nondiscriminatory application. While the FAA is comfortable with CCDOA's stated intent, the FAA is not opining on the actual implementation of the plan. FAA must remain objective should a complaint be filed alleging inconsistencies with CCDOA's plan and federal obligations.

### *3. Unintended Consequences:*

The air carrier incentive program was not created to test the upper limit of what a market will yield with respect to the number of passenger seats demanded. As such, an incentive program that allows for upgauging of aircraft must be constructed in a manner that does not allow for a perpetual upgauging of aircraft. Once the incentive period expires, upgauging aircraft as a means of offering new service cannot again be incentivized. This determination is consistent with the Revenue Use Policy and Grant Assurance 24 as it relates to the addition of flights to a markets schedule as well.

*While a sponsor's air carrier incentive program may be ongoing for several years, each air carrier's incentive period should be limited to no more than two years except under special circumstances (e.g., new entrants).*

The air carrier incentive program was never intended to be a maximum sustainable market growth-incentive program where airlines would be incentivized to test the limits of a markets demands. Rather the program was offered to airports to encourage airlines to test new markets and offer passengers more travel options and in turn promote more travel using the airport. The limits on allowable incentive periods have been vetted by FAA and deemed reasonable timeframes for airlines to assess the demand for a “new service” and evaluate the sustainability to continue that service without incentives in accordance with existing policy, grant assurance obligations, and statute.

### *III. Conclusion*

Incentive programs must walk the fine line between allowing sponsors the ability to enhance the viability of new service through temporary incentives and simply buying increased use of the airport. The air carrier incentive program, as currently constituted, ensures properly structured programs will meet the goals for which an air carrier incentive program is allowed. FAA has viewed the CCDOAs petition in order to ensure its proposal will meet the same goals. As such, FAA agrees that, with certain conditions in place, incentive programs may include opportunities for air carriers to upgauge existing service. The conditions must require flight schedules are not contracted while allowing airlines to receive proportional credit for upgauging existing flight(s) to targeted market(s) within the schedule to provide more capacity.

While FAA agrees to expand its interpretation of “new service” to include upgauging with stated parameters as an accepted form of new service, the onus to create an incentive program that is not unjustly discriminatory must be borne by the sponsor responsible for the airport-specific air carrier incentive program. The conditions included within this notice are guidance.

All existing guidance not addressed herein remains applicable. FAA reminds airport sponsors: incentives must not be offered in an unjustly discriminatory manner; incentives must be applied similarly to similarly situated carriers participating in incentive programs; new entrants are deemed similarly situated to incumbents after one year; and additional incentives for incumbents are limited to one year in accordance with past guidance.

Issued in Washington, D.C. on April 3, 2012

Randall Fiertz

Director, Airport Compliance and Management Analysis

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